FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 9 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES MCCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY and JESUS ECHEVARRIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

A. H. FRISCH,
Counsel for Respondents.

NEWGASS & FRISCH,
Attorneys for Respondents.

GEORGE W. NEWGASS,
NATHAN COOPER,
LEO H. HIRSCH, JR.,
Of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	4
Argument	14
POINT I—The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the reasoning in the case of *Kirschbaum* v. *Walling*, 316 U. S. 517, or *Walton* v. *Southern Package Corp.*, 320 U. S. 540	15
POINT II—The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the reasoning of various Circuit Courts of Appeal	18
POINT III—The question of Federal Law which this Court is asked to settle should not be settled by this Court	21
POINT IV—The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the decision of the Tenth Circuit in the case of *Rucker* v. *First National Bank of Miami, Okl.*, 138 F. (2d) 699	23
CONCLUSION	24

CITATIONS

CASES: PAGE

Armour & Co. v. *Wantock*, ... U. S. ..... (decided December 4, 1944) 18

Blumenthal v. *Girard Trust Co.*, 141 F. (2d) 849, C. C. A. 3 19

Building Service Employees International Union v. *Trenton Trust Company*, 142 F. (2d) 257, C. C. A. 3 19

Cochran v. *Florida Nat. Bldg. Corporation*, 45 F. Supp. 830, aff'd 134 F. (2d) 615, C. C. A. 5 19

Convey v. *Omaha Nat. Bank*, 140 F. (2d) 640, C. C. A. 8, certiorari denied 321 U. S. 78 19

Johnson v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A. 5, certiorari denied 318 U. S. 790 19

Johnson v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied 321 U. S. 780 19

Kirschbaum Co. v. *Walling*, 316 U. S. 517 ..... 14, 15, 17, 20, 21, 22, 23, 25

Lofther v. *First Nat. Bank of Chicago*, 48 F. Supp. 692, aff'd 138 F. (2d) 299, C. C. A. 7 19

McLeod v. *Threlkeld*, 319 U. S. 491 ..... 18, 20

Noonan v. *Fruco Const. Co.*, 140 F. (2d) 633, C. C. A. 8 19

Overnight Motor Transportation Co., Inc. v. *Missel*, 316 U. S. 572 26

Rosenberg v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied *sub nom. Semério et al.* v. *Rosenberg*, 320 U. S. 770 19

CASES (continued): PAGE

Rucker v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied 321 U. S. 769 ..... 14, 18, 19, 23, 24

Santa Cruz v. *Labor Board*, 303 U. S. 453 18

Stoike v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied 320 U. S. 762 19

Tate v. *Empire Building Corporation*, 135 F. (2d) 743, C. C. A. 6, certiorari denied 320 U. S. 766 19

Walton v. *Southern Package Corp.*, 320 U. S. 540 ..... 14, 15, 18, 24

Warren Bradshaw Drilling Co. v. *Hall*, 317 U. S. 88 25

STATUTES:

Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Secs. 201-219) 2, 4

Sec. 207(a) 2, 3, 4
Sec. 203(b) 3
Sec. 203(j) 3, 4
Sec. 216(b) 3, 4

Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347) 1, 2

TEXTS:

Robertson, Jurisdiction of the Supreme Court of the United States 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY and JESUS ECHEVARRIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 102-106) is reported in 52 F. Supp. 952.

The majority and dissenting opinions of the Circuit Court of Appeals, Second Circuit (R. 128-132) are not yet reported.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code,

Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Questions Presented

The primary question presented is whether the respondents were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 (52 Stat. 1060, June 25, 1938, 29 U. S. C. Secs. 201-219).

The answer to this primary question depends on the further question of whether the particular activities of the Borden Company in the Borden Building constituted "production" of goods for commerce within the meaning of said act.

The Statute Involved

The original statute, before being incorporated into the United States Code was the Act of June 25, 1938, c. 676, 52 Stat. 1060. The sections in the original Act were Sections 1 to 19, inclusive. In the Code, two hundred numbers were added to each section number, so that the section numbers in the Code run from 201 to 219, inclusive.

For purposes of brevity we shall, hereinafter, refer to the Fair Labor Standards Act of 1938 as the "Act", or the "statute".

Section 207—Maximum Hours:

> "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> "(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date.

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 203—Definitions:

"As used in sections 201-219 of this title—

* * * * * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * * * *

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof*, in any State." (Italics ours.)

Section 216—Penalties; Civil and Criminal Liability:

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Statement

This case involves the scope of the Fair Labor Standards Act of 1938 (U. S. Code, Title 29, Chap. 8, Secs. 201-219) in relation to a particular phase of industrial activity. Under Section 207(a) an employer must pay overtime compensation to any of his employees who is "engaged in commerce or in the production of goods for commerce". Section 203(j) provides that "for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any process or occupation necessary to the production thereof * * *".

The employees here are engaged as service and maintenance men in a building in New York City called the Borden Building. The activities carried on in such building will be described in detail hereinbelow.

Section 216(b) makes an employer who violates the provisions of Section 207 liable to the employees affected in the amount of their unpaid overtime compensation and in an additional equal amount as liquidated damages, permits employees to maintain an action to recover such liability and directs the court in such action, in addition to any judgment awarded to the plaintiffs, to allow a reasonable attorney's fee to be paid by the defendant.

The precise question before the Court below was whether the Act extended to such service and maintenance employees in the Borden Building.

The Borden Company occupies seventeen floors, in whole or in part, of the Borden Building, located at 350 Madison Avenue, New York City, which has twenty-four floors, and which is owned by it. *From the offices in said building, an elaborate system of interstate production is controlled and given its operating force.* This particular system is such that without the activities carried on in its offices in the Borden Building, the Company's manufacturing plants located in various states in the country (R. 13) could not operate,

any more than they could without their plant machinery or plant superintendents. These particular activities in the Borden Building constitute a vital element in the Borden Company's interstate production system. The details of the peculiar and unique manufacturing set-up of this Company are set forth hereinbelow.

This case presents facts clearly different from those present in the ordinary case of corporate home office supervision.

Nature of Respondents' Activities

The respondents are service and maintenance employees in the Borden Building, and are employed by the petitioner in connection with its operation and maintenance of said building. Some of the respondents are porters, some are watchmen, and others are elevator men (Finding 7, R. 118).

The respondents performed work ordinarily done by porters, watchmen and elevator men in such a building. The details of their work are set forth in the deposition of Marshall (R. 83-97). The porters clean lavatories, corridors, stairways and other places in the building, and have a few incidental duties, such as moving furniture, packing waste paper, distributing towels, etc. The night watchmen protect the building and its contents from fire and theft by making the rounds of the building and punching "Watchmen's keys" distributed in seventy-four stations throughout the building. They also require night visitors to the building to sign a register. The elevator men run the eight elevators in the building. The elevators are used by all the occupants of the building.

In short, the respondents contribute and are essential to making the Borden Building safe, clean, and habitable for the use of its occupants.

The Building and Its Occupants

The building is a twenty-four story office building at No. 350 Madison Avenue in the City, County and State of

New York, and is owned by the petitioner (Finding 6, R. 117). The total rentable area of the building is about 198,018 square feet (R. 101). During the period in question the Borden Company occupied 115,710 square feet (R. 101), which constitutes about 58% of the total rentable area. The space used by the Borden Company takes up in whole or in part approximately seventeen of the twenty-four floors, and the building is the home office of the company (Finding 8, R. 118). The remainder of said building not occupied by the Borden Company is occupied pursuant to written agreements of lease by various persons, firms, partnerships, associations and corporations (Finding 17, R. 119), and none of said tenants produce, manufacture, handle, process or in any other manner work on any goods in said building (Finding 18, R. 120). We shall therefore limit our discussion to the activities of the Borden Company in the building.

Some General Facts About the Borden Company

The Company is a New Jersey corporation (Finding 1, R. 117). It is licensed to do business and is doing business in the State of New York and in the Southern District of New York (Finding 2, R. 117).

The Company is engaged in the business of processing, manufacturing, selling and distributing fluid, condensed, evaporated milk, casein, ice cream, butter, cheese and various other products (Finding 3, R. 117). It also manufactures various other products. During the period in question, its gross sales exceeded $200,000,000 per year (R. 100). *It does business throughout the United States and in foreign countries* (Finding 4, R. 117). *The company owns and operates plants and factories in the United States and Canada* where it processes, manufactures, and from which it sells and distributes its products (Finding 5, R. 117; R. 13) across state lines.

The Activities of the Borden Company in the Borden Building

There are 822 employees of the Borden Company working in the Borden Building (R. 98). We shall analyze their activities in some detail, in most cases dealing only with large groups. We regret having to burden the Court with such detail, but it is unavoidable, since, in our view of the law, each case of this kind must be decided on its own facts, and the issues raised by the petition for certiorari cannot be properly analyzed without a scrutiny of the facts.

The Borden organization includes "General Departments", "Divisions", "Departments", "Bureaus", etc. There is a distinction between general departments relating to the company as a whole, and departments which are connected merely with Divisions (R. 51-52).

The following is an organizational chart of the activities of the Borden Company in the Borden Building:

Board of Directors
Executive Officers
General Accounting Department
General Advertising Department
Legal Department
Income Tax Department
Bureau of Insurance
Public Relations Department
The Various "Divisions" of the Company:
—Manufactured Products Division
—Manufacturing Department
—Sales Department
—Credit Department
—Cashier's Department
—Accounting Department
—Controller
—Disbursing
—Bank Reconciliation
—Cost Accounting
—Stock
—Sales Tabulation

—Casein Division
—National Milk Sugar Division
—Special Products Division
—Cheese Division
—Ice Cream Operation
—Fluid Milk Operation

Departments Covering Several Divisions:
—Purchasing Department
—Label Department
—Export Department
—Real Estate Department
—Safety Bureau
—Payroll Tabulation Department
—Central Transcribing Bureau
—Telephone and Switchboard
—Traffic Department
—Stationery Department
—Mailing Department
—Photostat and Photo-offset Department
—Experimental Kitchen

We cannot, within the limits of this brief, go into detail about the specific activities of each of these groups. However, we call the attention of the Court to the activities of the following groups of Borden employees in the Borden Building:

The Manufacturing Department of the Manufactured Goods Division;

The Accounting Department of the Manufactured Goods Division;

The Purchasing Department.

The Manufactured Products Division is located on several floors, and has charge of all manufactured products except casein and milk sugar (R. 43), which have their own Divisions.

The Manufactured Products Division has several departments and sub-departments. Among them are the Manufacturing Department and the Accounting Department.

The Manufacturing Department

This Department (R. 43-47) occupies the entire seventh floor of the building. It controls the superintendents of the various factories throughout the United States. It supervises the instructions for running the plants which manufacture all products of the Borden Company except casein and milk sugar. It receives advice daily from the various factories as to the pounds of milk received. If the supply of milk is inadequate for economical operation, this department will issue instructions to some other factory to divert their milk to the plant, or will change running instructions of the plant from either condensed to evaporated or some other manufactured product which the plant is qualified to run. It instructs the various factories as to when they should decrease production, and when they should change the form of production. It receives requests from superintendents of the individual plants and factories for instructions in connection with equipment, repairs, labor problems, purchase of trucks and automobiles. It determines new methods of manufacture and sends instructions to all the factories to use such new methods. It sends instructions throughout the United States. It controls the supply of raw materials for each plant. It controls the size, quantity and production of ten receptacles for Borden products, and is in charge of tin shops and machine shops where the Company makes tin cans. It appoints the top manufacturing personnel for the various plants. It receives audits from the individual factory superintendents as to their requirements, and sets up budgets for such factories. It approves the letting of contracts for various business matters that arise in connection with the operation of such plants. It makes contracts for the purchase of heavy plant expansion, issues orders for the construction of increased facilities, arranges the financing of plant expansion, and pays the bills for heavy equipment contracted for. Such intimate and instantaneous control of plant operations all over the United States from

a building in New York City might almost seem to be impossible. It is true that this department does have two efficiency engineers who travel to and inspect the plants, and report to this department. It is also true that long distance telephone facilities are available (R. 26). But the real explanation is that this department has a *teletype machine with direct wires from the Borden Building to the various factories all over the nation* (R. 26). As Mr. Wyman admitted (R. 44) the manufacturing department in the Borden Building is the "*pulse* of the supply and demand condition of the individual factories and plants of the Borden Company throughout the United States". The pulsations of the production ideas created and worked on in the Borden Building flow instantaneously over the teletype wires. The factories make products for shipment across state lines, and these products are sent across state lines as a result of the direction and control exercised by the manufacturing department in the Borden Building (R. 44). In effect, there is a regular system of interstate production.

Accounting Department

Next we discuss the Accounting Department (R. 13-14; 45; 53-55) of the Manufactured Products Division. This department occupies the eighth, ninth and part of the tenth floors of the building, and is in charge of Mr. Wyman who has the title of Controller.

The controller of this department supervises this entire department. His office issues all accounting instructions to various plants and factories of the defendant throughout the United States with respect to reporting to the home office at 350 Madison Avenue as to

(a) production figures, disbursements, receipts and shipment of goods from plants and factories;

(b) instructions pertaining to deductions of social security and state unemployment insurance, taxes and the proper method of so reporting on payroll records (R. 13).

The controller's office establishes and perfects financial statements with respect to the recording of sales, costs of sales, deductions, selling and administration expenses to arrive at net profits (R. 14). It supervises a staff of traveling auditors who visit each plant and factory for the purpose of internal control (R. 14). It supervises personnel matters in connection with factory and subsidiary employees (R. 14). The controller visits the defendant's plants and factories from an administrative standpoint and establishes accounting procedure (R. 54-55). He directs, supervises and controls said plants and factories from an accounting view. He offers suggestions as to the increase and decrease of personnel, and sometimes employs personnel. He also instructs the superintendents of defendant's plants and factories as to methods of procedure developed at the home office for reports to the home office so that there is a systematic running of the Manufactured Products Division from the home office at 350 Madison Avenue (R. 55). Accounting reports prepared in the Borden Building are sent across state lines to plants outside of the state (R. 54). His department acts as a control system of all the plants and factories of this division throughout the country (R. 50).

There are five sub-departments of the Accounting Department of the Manufactured Products Division: Disbursing, Bank Reconciliation, Cost Accounting, Stock and Sales Tabulation. The disbursing sub-department (R. 49-50) is located on the eighth floor. It pays all bills and invoices. It pays brokers' commissions and makes payments on contracts. It also keeps track of and distributes factory disbursements. It checks to see whether factories have received purchases, before paying the bills. It covers all the factories and plants of the Manufactured Products Division throughout the nation.

The Bank Reconciliation sub-department (R. 47-48) is located on the eighth floor. It covers the bank accounts of the plants all over the country. The local banks send duplicate bank statements to the superintendents of the

various factories. The superintendent retains the duplicate but forwards the original bank statement and the vouchers to this sub-department which checks them for errors.

The Cost Accounting sub-department (R. 48-49) is located on the eighth floor of the building. It devises and applies methods of cost accounting to arrive at the individual factory cost of individual manufactured products. The factories send in the figures of expenditures, and this sub-department collects and analyzes them. Its computations are sometimes used by the Manufactured Products Division as a basis for stopping production, increasing production, or changing the methods of production. The computations are also used by the General Accounting Department in preparing a profit and loss statement for the Borden Company. This sub-department also makes estimates of cost of production of proposed new products. It also does similar work for the Cheese Division (R. 48). It keeps records of raw materials and supplies (R. 51).

The Stock sub-department (R. 50-51) is located on the ninth floor of the building. Its records cover finished goods only. It works in conjunction with the Sales Tabulation sub-department. It keeps a perpetual running inventory of finished goods for every plant and factory. It receives semi-monthly and monthly reports of factory production all over the United States. It adds production and subtracts sales from the running inventory and arrives at an inventory at the end of the outlay. The inventory figures are turned over to the Cost sub-department for use in its computations.

The Sales Tabulation sub-department (R. 51) is located on the ninth floor. Its function is to tabulate all sales made to customers. Its computations are used by the Stock sub-department in computing the running inventory, and also to check Accounts Receivable from Sales.

Purchasing Department

The Purchasing Department (R. 69-71) occupies the entire thirteenth floor of the Borden Building and is in charge

of Mr. Morse. The various factories communicate their needs to the vice-president in charge of each operation, and he advises the purchasing department of such needs. Representatives of this department also visit the factories to determine their requirements. This department purchases the needed supplies from visiting salesmen. It also negotiates and makes contracts for the purchase of the needed articles. It purchases substantially all the major supplies, machinery and raw materials needed by the plants and factories for the production of goods. Among the articles it purchases are sugar, coal, tinplate, labels, fibre boxes, wooden boxes, coffee, cleaning powder, heavy machinery, cocoa, malt, liquor, bottles, bottle caps, ice cream cartons, and barrels. These purchases cross state lines and are used to produce goods for shipment across state lines.

Criticism of Petitioner's Summary Statement

At pages 2 to 4 of its petition, petitioner sets forth its "Summary Statement." There are several assertions therein to which we take exception.

In the second sentence in the first full paragraph on page 2, petitioner attempts to summarize the theory underlying the ruling of the Circuit Court of Appeals in the case at bar. Petitioner asserts that such theory was that "the respondents had no relationship or tie with the actual production of goods." As we shall later show, this assertion is plainly wrong.

In the fifth full paragraph on page 3 petitioner asserts that the activities carried on by the Borden Company in the Borden Building do not constitute "production". Such assertion begs the very question involved in the case at bar.

In the first full paragraph on page 4 petitioner refers to finding of fact 9 (R. 118) which states that the petitioner "directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employ-

ees", and in the fourth full paragraph on page 4, petitioner asserts that the "Circuit Court of Appeals accepted and adopted the facts as found by the Trial Judge." It is true that the Circuit Court of Appeals did say: "The facts, which are not in dispute, are sufficiently stated in the findings of the trial judge" (R. 128). However, the adoption by the Circuit Court of Appeals of finding 9 should not be construed to mean that the Circuit Court of Appeals treated the case at bar as the case of an ordinary home office building having only a general remote supervision over the activities at its factories. The Circuit Court of Appeals had all the detailed facts before it, and also stated in its opinion (R. 128-129):

> "The manufacturing all takes place in factories in the United States and Canada, which it owns and operates; but its executive and administrative activities—the supervision, management and control of the entire business—are all centered in an office building in New York, * * *. * * * This is the spot from which all directions go out as to what shall be bought, what shall be manufactured, where the products shall be distributed, etc."

Argument

Petitioner urges three reasons for the granting by this Court of a writ of certiorari:

I. An alleged conflict between the decision of the Circuit Court of Appeals in the case at bar and the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Rucker* v. *First Nat'l Bank of Miami, Okla.*, 138 F. (2d) 699;

II. An alleged conflict between the decision of the Circuit Court of Appeals in the case at bar, and the reasoning of this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, and in *Walton* v. *Southern Package Corporation*, 320 U. S. 540, and the reasoning of various Circuit Courts of Appeals and District Courts;

III. That this Court should settle an important question of federal law which has not been but which should be settled by this Court.

We submit that there is no substance to any of these alleged reasons and in support of our position that the writ should be denied we submit the following points, varying the sequence of petitioner's points in the interest of clarity.

POINT I

The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the reasoning in the case of *Kirschbaum* v. *Walling*, 316 U. S. 517, or *Walton* v. *Southern Package Corp.*, 320 U. S. 540.

At page 5 of its petition, petitioner urges that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the reasoning of this Court in *Kirschbaum* v. *Walling, supra,* and in *Walton* v. *Southern Package Corp., supra.* But in Point II of its supporting brief (pp. 15-22) where it expands the argument, it entirely ignores the *Walton* case. We believe that the omission of the petitioner in its Point II was not mere inadvertence.

We respectfully submit that there is no such conflict of reasoning as is alleged by the petitioner.

Let us examine the opinion of the Circuit Court of Appeals in the case at bar.

That Court first properly distinguished between the phrases "engaged in commerce" and "engaged in the production of goods for commerce".

The further reasoning of the Circuit Court of Appeals in the case at bar may best be analyzed by reference to two hypothetical cases:

Case A

Assume that a producing company has as usual, two classes of employees: 1) artisans, shipping clerks and

others, who come in actual contact with, or make or handle the raw materials or the finished goods, and 2) executive and administrative agents and employees who do not come in physical contact with the goods at any stage of their production, but who direct, supervise, manage and control the whole conduct of the company. Assume further that both classes of employees are housed in *one* building with only one group of caretakers.

The Circuit Court recognized that where all the activities of the company take place in *one* building and where the quarters occupied by those employees actually in contact with the raw materials or finished goods were greater in area than those occupied by the administrative officials, the *Kirschbaum* case governs, and the caretakers of such a building are "engaged in production", because those employees who come in actual contact with the raw materials or finished goods are "engaged in production" and because the caretaker's work is "necessary" to their activities under Section 3(j) of the Act, and under the *Kirschbaum* case.

CASE B

Assume that the two classes of employees of the producing company described in Case A are housed in *two separate buildings,* the building housing the class of employees having no physical contact with the raw material or finished products being located either on the same plot as the factory, or across the street, or as in the case at bar, in a different city.

In this situation the Circuit Court of Appeals reasons that the question is narrowed from whether the *caretakers* are "engaged in the production of goods for commerce" to whether the *administrative agents and employees,* having no such physical contact, are themselves "engaged in the production of goods for commerce". The Court recognized that these words were words of colloquial speech having "fringes" of connotation and that interpretation may vary. It cautions against interpreting the phrase by using it as a starting point for a dialectical progression of step by step

examples because legislators concerned with ordinary affairs do not expect their words so to be used. It holds that the best way to reach the true meaning is to look at the underlying purpose of the Act and to try to project, upon the specific facts, how legislators, actuated by such a purpose would have dealt with it if it had been presented to them at the time of enactment of the Act. It reasons that the purpose of the Act included the caretakers in both Case A and Case B, and that the fact that administrative officials do not come in physical contact with the goods at any stage of their production could not have been thought relevant to the object to be obtained. It recognizes that the words of a statute contains no words of limitation, and that those who give the directions to employees having physical contact with the goods are as "necessary" to production within the meaning of Section 3(j) as those who do have such physical contact. It concludes by asserting that no vague compunction to extend the area of federal control should cause hesitation in giving the purpose of the statute its full scope, and that the realization of the object of the statute should not be truncated by irrelevant considerations.

Petitioners, at pages 15 to 19 of their brief, allege that the reasoning of the Circuit Court of Appeals in the case at bar is in conflict with the reasoning of this Court in the *Kirschbaum* case. It quotes at length from this Court's opinion in that case, particularly seizes upon the language "close and immediate tie" and "direct and immediate tie", and urges that the Circuit Court of Appeals failed to follow that test. Actually the Court below did wholeheartedly accept the *Kirschbaum* case as a starting point for its reasoning. By so doing it incorporated by reference all the reasoning in the *Kirschbaum* case and was not required to reiterate the specific language of that case.

Petitioner, at page 17, erroneously construes the *Kirschbaum* case as requiring that the activities of the service and maintenance employees must sustain such a close relation to "production" as to be "in reality a part thereof".

Such a construction is untenable, particularly after the *Walton* case, *supra*, where this Court reiterated its holding that making a building safe, clean and habitable for production was a sufficiently "close and immediate tie" with the process of production to bring an employee within the coverage of the Act. See also *Armour & Co.* v. *Wantock* (December, 1944), ... U. S. .....

On pages 18 and 19 of its brief, petitioner indulges in the dialectic reasoning which this Court specifically repudiated in the *Kirschbaum* case (at p. 526) when it quoted from *Santa Cruz* v. *Labor Board*, 303 U. S. 453, to the following effect:

> "And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases."

POINT II

The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the reasoning of various Circuit Courts of Appeal.

At pages 5 and 6 of its petition, and at pages 19-22 of its supporting brief petitioner asserts that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the reasoning of the decisions in various cases decided by other Circuit Courts of Appeal.

We postpone for later discussion the *Rucker* case, *supra*.

As to the other cases listed by petitioner, we respectfully submit that no such conflict of reasoning exists.

The statute covers employees "engaged in interstate commerce", and employees "engaged in the production of goods for interstate commerce". This Court has held that the latter phrase is broader than the former and includes employees not covered by the former. *McLeod* v. *Threlkeld* (June, 1943), 319 U. S. 491.

Care must be taken to distinguish a line of cases which denies recovery to service and maintenance employees of

a building whose occupants are merely "engaged in interstate commerce" and not "engaged in the production of goods for commerce", in the building.

Stoike v. *First National Bank of the City of N. Y.* (Apr., 1943), 290 N. Y. 195 (certiorari denied);
Johnson v. *Dallas Downtown Development Co.* (C. C. A. 5) (Dec., 1942), 132 F. (2d) 287 (certiorari denied);
Cochran v. *Florida Nat. Bldg. Corp.* (C. C. A. 5) (Apr., 1943), 134 F. (2d) 615;
Tate v. *Empire Bldg. Corp.* (C. C. A. 6) (June, 1943), 135 F. (2d) 743 (certiorari denied);
Rosenberg v. *Semeria* (C. C. A. 9) (Aug., 1943), 137 F. (2) 742 (certiorari denied);
Lofther v. *First Natl. Bank of Chicago* (C. C. A. 7) (Oct., 1943), 138 F. (2d) 299;
Convey v. *Omaha Natl. Bank* (C. C. A. 8) (Dec., 1943), 140 F. (2d) 640 (certiorari denied);
Rucker v. *First Natl. Bank of Miami* (C. C. A. 10) (Oct., 1943), 138 F. (2d) 699 (certiorari denied);
Johnson v. *Masonic Bldg. Co.* (C. C. A. 5) (Nov., 1943), 138 F. (2d) 817 (certiorari denied);
Noonan v. *Fruco Construction Co.* (C. C. A. 8) (Dec., 1943), 140 F. (2d) 633;
Blumenthal v. *Girard Trust Co.* (C. C. A. 3) (Apr., 1944), 141 F. (2d) 849;
Building Service Internatl. Union v. *Trenton Trust Co.* (C. C. A. 3) (May, 1944), 142 F. (2d) 257.

The foregoing cases are the ones cited by petitioner as involving a conflict of reasoning with the decision in the case at bar. They are clearly distinguishable on the ground above mentioned and have no bearing on the instant case.

The petitioner attempts to show (pp. 19, 20) the relevancy of these cases by urging that building service employees in a category of buildings which it labels as "office

buildings" are not covered by the Act. It urges that these cases make no distinction between office buildings, based upon the varying and diversified activities in which tenants in "office buildings" are engaged. It mentions certain situations where service employees in office buildings have been held not to be covered by the Act. However, it omits to mention the situation involved in the case at bar, i.e., where the tenants are the executive and administrative personnel of producing companies whose activities in the building are such an important element in the process of production. In attempting to establish a category of "office buildings" the petitioner runs afoul of the language of the statute and of the reasoning of this Court in the *Kirschbaum* case, *supra*. In that case this Court warned that the phrase "engaged in the production of goods for commerce" cannot be construed by using abstract or rigid formulas or general propositions, that the Aet puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations, and that the Court cannot escape an inquiry into the relationship of the particular employees to the production of goods for commerce. The petitioner's attempt to create a category of "office buildings" would wrongly stifle, at the threshhold, the inquiry concerning what activities were carried on by the occupants of the particular building involved.

At page 20 of its brief petitioner alleges that it believed that the foregoing cases construing the phrase "engaged in commerce" settled the law for all "office buildings". In this belief it was clearly in error, particularly after this Court decided *McLeod* v. *Threlkeld, supra*. It also urges that its belief was strengthened by the action of this Court in denying certiorari in those cases. This argument may also be quickly discarded, since this Court has repeatedly warned the members of the bar that a denial of a writ of certiorari imports no expression of opinion upon the merits of the case.

At pages 21-22, petitioner attacks the reasoning of the Circuit Court of Appeals in the case at bar as being novel, legislative, and in conflict with the requirement of a "close and immediate tie". We do not think there is any merit to these contentions. There is no novelty in using the purpose of a statute to get at its meaning. The judicial task was to decide this case, and the Court below, when it took a small step forward, performed only a proper judicial, and not a legislative, function. We have already shown that the Court below did incorporate by reference the reasoning in the *Kirschbaum* case, when it completely accepted the *Kirschbaum* case as the starting point for its decision.

At the bottom of page 19 and top of page 20 of its brief, petitioner alleges a conflict between the decision of the Court below in the case at bar and the reasoning of some District Courts, both in and out of the Second Circuit. We are not aware that a conflict between a Circuit Court of Appeals and a Federal District Court is an adequate reason for granting a writ of certiorari. (See Robertson, "Jurisdiction of the Supreme Court of the United States", pp. 576 et seq.)

In short, no such conflict of reasoning exists as would justify the granting of a writ of certiorari in the case at bar.

POINT III

The question of federal law which this Court is asked to settle should not be settled by this Court.

In Point III of its brief petitioner asserts that the Circuit Court of Appeals for the Second Circuit has decided an important question of federal law which has not been but should be settled by this Court. We respectfully submit that this contention is entirely without merit.

Petitioner asks this Court to settle the abstract question of whether building service employees who work in a hypo-

thetical category of buildings, which it describes as "office buildings", are covered by the Act. This request is a natural consequence of petitioner's failure to understand the significance of the line of cases interpreting the phrase "engaged in commerce". Apparently it rejects this Court's reasoning in the *Kirschbaum* case that each case must be decided on its own facts, and that categories and rigid formulas must be avoided.

At page 22 of its brief petitioner asserts that no goods were "produced" in the Borden Building. This assertion begs the very question involved in this case. We contended below that the brain power element in manufacture was just as much "production" as muscle power and machinery. The opinion of the Court below (R. 130) shows that that Court so held.

Petitioner does not ask this Court to settle the question of whether maintenance employees of office buildings whose occupants perform vital elements in the productive process are covered by the Act. Instead it asks this Court to settle the law for all "office buildings", regardless of the nature of the activities of their occupants. We submit that this Court should not and cannot properly decide such an abstract question.

It may be true that the law applicable to "office buildings" as a category is unsettled. However, we believe that no one case can settle it. The facts in each case must be carefully scrutinized to see whether the test of "engaged in the production of goods for commerce" is met. The case at bar did not add any uncertainty that was not already inherent in the task imposed by the statute upon the courts.

The possible retroactive liability of owners of office buildings (described on p. 7 of the Petition herein) should be a subject for legislative rather than judicial concern. Certainly this Court cannot be blamed for the misinterpretation placed upon its denial of certiorari in many cases, after the adequate warning it has given the bar.

POINT IV

The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the decision of the Tenth Circuit in the case of *Rucker* v. *First National Bank of Miami, Okl.*, 138 F. (2d) 699.

In Point I of its brief (pp. 11-15) petitioner asserts that the decision of the Court below is avowedly in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the same matter in the *Rucker* case, *supra*. We respectfully submit that there is no merit to this contention.

The real difference in the views of the Second Circuit in the case at bar, and of the Tenth Circuit in the *Rucker* case, is on the question of whether "production" must be confined to actual contact with the raw material or finished goods. The Second Circuit said no. The Tenth Circuit assumed an affirmative answer without analyzing the problem. This explains its statement (at p. 702):

> "* * * it is not shown on this record whether any of the goods were produced in the building or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of goods."

Ordinarily such language might be urged as a conclusive distinction between the *Rucker* case and the case at bar, for in the case at bar we have shown that there is "production", in the sense of the brain power element in production, in the Borden Building. But in view of the confusion as to the meaning of the word "production" we do not urge any such conclusive effect.

However, the Tenth Circuit in the *Rucker* case actually decided the case on a ground distinct from the question of whether "production" must be confined to actual physical contact with the goods. It really decided the case on a misinterpretation of the *Kirschbaum* case, *supra*. It indi-

cated that, even assuming that the occupants of the building were engaged in "production" within the meaning of the statute, building service and maintenance men who merely made the building safe, clean and habitable, without physically participating in the process of manufacture, did not have a sufficiently close "tie" to production. After first discussing whether or not there was "production" in the building, that Court said (p. 702):

> "*In any event,* the relationship is not shown to be 'close and immediate'." (Italics ours.)

This was the view which the Mississippi Supreme Court adopted in the *Walton* case, *supra*. After the Tenth Circuit decided the *Rucker* case, this Court reversed the *Walton* case. Such reversal of the *Walton* case was in effect a repudiation by this Court of the decision in the *Rucker* case.

We submit that a case actually involving a different point and repudiated as the *Rucker* case has been, should not be made the basis for granting a writ of certiorari because of an alleged conflict.

CONCLUSION

The decision below is correct. The essence of this case is whether physical contact with the raw material or finished goods on the part of the occupants of a building is essential to "production". The Court below held in the negative and we believe that decision is correct. We believe that the production process is basically composed of several elements, namely, brains, brawn, raw material and machinery. Each of these is a vital part of the process of production. Raw materials, machinery and brawn alone will not produce goods. There must also be the creative force of brain power, to determine when and how machinery and brawn should be applied to raw materials, and to determine when, where and how to acquire raw materials.

In the usual case, all these elements are located in the same geographical place. The instant case is entirely different. Because of modern scientific methods of communication, such as teletype, it has been possible geographically to separate a large part of the element of brain power in production from the other elements necessary to production. This separation has been particularly advantageous in the case of the Borden Company, where many factories are under unitary ownership. The geographical separation of brain power from the other elements has made it possible to concentrate a large part of the production brain power at one spot, and thus to derive maximum efficiency in production.

The conclusion is inescapable that the activities in the Borden Building being an important *element* in the production of the Borden products, constitute "production" in the Borden Building of such goods within the meaning of the Act. This conclusion is fortified by the language of the Act in Section 203(j) where Congress has stated that an employee engaging in any *"process necessary"* to the production of goods constitutes production of goods. This Court has held that an essential preliminary step in the production process constitutes "production".

Warren Bradshaw Drilling Co. v. *Hall* (Nov., 1942), 317 U. S. 88.

In that case oil drillers who drilled only to a specified depth short of oil were held to be engaged in the production of oil. This Court held that the drilling was a necessary part of the productive process to which it was intimately related. Moreover, this Court has already held that a *physical* process is not necessary to production.

Kirschbaum v. *Walling*, *supra*.

Viewed from the implications of our dual system of government, the case at bar is correctly decided. Congress has said that *intrastate* production destined for interstate com-

merce has a substantial effect on interstate commerce. As a consequence, Congress has forbidden substandard *intrastate* production. Certainly Congress also intended the Act to apply to cases, like the instant case, where the process of production is *interstate* and spread out over many states.

Viewed from the point of economic and social policy, the decision of the Court below is sound. One of the purposes of the Act is to spread employment.

Overnight Motor Transportation Co., Inc. v. *Missel* (1942), 316 U. S. 572.

The decision of the Court below contributes to the spreading of employment and thereby will aid in solving the post-war problem of providing jobs for returning war veterans.

There is no conflict warranting the granting of a writ of certiorari in the case at bar. The question of federal law which petitioner asks this Court to settle should not and cannot properly be settled by this Court. It is therefore respectfully submitted that the petition should be denied.

December, 1944.

A. H. FRISCH,
Counsel for Respondents.

NEWGASS & FRISCH,
Attorneys for Respondents.

GEORGE W. NEWGASS,
NATHAN COOPER,
LEO H. HIRSCH, JR.,
of Counsel.